

REMARKS

In the Office Action dated September 7, 2005, the Examiner rejected claim 30 under 35 U.S.C. 103(a) as being unpatentable over the brochure on "Paint Pop" product in view of Nichols and Chan. That rejection, as well as the rejection in the Office Action of March 24, 2006, is traversed, particularly as to the amended claims.

Attached hereto is a Declaration by Applicant, as well as supporting exhibits, which establishes that Applicant conceived the present invention prior to Chan's filing date of June 23, 1989, and that Applicant diligently reduced the invention to practice subsequent to that time.

Because Chan was previously relied on in rejecting Applicant's invention and because the Chan reference can no longer be used in rejecting Applicant's invention, Applicant's claims are thus allowable.

In the most recent Office Action of March 24, 2006, the Examiner asserted that newly submitted claims 33-50 are directed to an invention that is independent or distinct from the invention originally claimed. This assertion is incorrect. Further, Applicant vehemently objects to the Examiner's attempted unilateral withdrawal of claims 33-50 based on the Examiner's misapplication of MPEP § 821.03 and 37 C.F.R. § 1.142. Nowhere in any of the cited references relied on by the Examiner in withdrawing Applicant's claims is there any language which could reasonably lead the Examiner to believe that she could choose to withdraw Applicant's claims without first issuing a Restriction Requirement. As such, claims 33-50 have not been effectively withdrawn and are thus still pending.

Claims 33-41 depend on independent claim 30. These dependent claims are thus not "independent and distinct from independent claim 30" as the Examiner contends. As I am sure the Examiner is aware, pursuant to MPEP § 821.04 ("Rejoinder"), the Examiner is required to remove a restriction requirement when the restricted and/or withdrawn claim "depends from or otherwise requires all the limitations [of a non-restricted claim]". In addition, the Examiner's reasoning for the present and unorthodox restriction requirement is assertedly based upon language in the new claims relating to "liminiferous" (*sic.*), "gas generating", "gas releasing", and "flowable confectionary comprising shaped pieces and fluid confectionery". The Examiner further asserted that "the claim directed to different bristle portion is distinct species (*sic.*) because the shape is different"; and "claims directed to packaging are distinct because they pertains (*sic.*) to packaged product", (paragraph 1, page 2 of Office Action).

Independent claim 43 does not contain any elements related to the examiner's assertion for necessitating withdrawal of that claim. As such, claim 43 is not a proper candidate for a restriction requirement. Additionally, because Applicant's claims 44-48 depend upon claim 43, those claims are also not subject to restriction and are also allowable. Independent claim 49 is apparently the focus of the Examiner's hollow assertion that "claims directed to packaging are distinct because they pertains (*sic.*) to packaged product", (paragraph 1, page 2 of Office Action). The examiner thus asserts that the language directed to "packaging" is distinct from the invention originally claimed. This assertion is incorrect. On April 27, 2001, Applicant submitted a preliminary amendment which added claim 27. The last line of that claim read "packaging comprising a holder for said paint brush, said holder attached to said can". Examiner Lien T. Tran examined that claim in the original Office Action for the present application, which was issued on May 8, 2001. It is important to keep in mind that this is the same Lien T. Tran who is now asserting that Applicant's present claims, directed to "packaging", are directed to subject matter which is "distinct from the invention originally claimed". Based on the foregoing, Applicant's independent claim 49 does not contain subject matter which is distinct from the invention originally claimed. Independent claim 49, as well as dependant claim 50 are thus not proper candidates for a restriction requirement. Additionally, because Applicant has established a date of invention prior to the critical date for the Chan patent, claims 49 and 50 are thus in a condition for allowance.

In the most recent Office Action, the Examiner asserted that there was not sufficient support in the specification for the limitations of "completely edible handle portion" and "completely edible bristle portion" as required by 35 U.S.C. § 112. The Examiner's rejections are moot in view of Applicant's current amendments to the claims.

In view of the above amendments and remarks, it is submitted that all grounds of rejection and objection have been avoided and/or traversed. It is believed that the case is now in condition for allowance and same is requested.

If any issues remain, or if the Examiner believes that prosecution of this application might be expedited by discussion of the issues, the Examiner is cordially invited to telephone the undersigned attorney for Applicant at the telephone number listed below.

Authorization is given to charge payment of any additional fees required, or credit any overpayment, to Deposit Acct. 13-4213.

Respectfully submitted,



Date: July 21, 2006

By: Jeffrey D. Myers, Reg. No. 35,964
Direct line: (505) 998-1502
E-Mail: DPeacock@Peacocklaw.com

PEACOCK MYERS, P.C.
Attorneys for Applicant(s)
P.O. Box 26927
Albuquerque, New Mexico 87125-6927
Telephone: (505) 998-1500
Facsimile: (505) 243-2542

Customer No. 005179

File: 306871001
G:\AMDS\Impact\313 - OA Resp July 2006.doc